

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF VIRGINIA  
DANVILLE DIVISION

CLERK'S OFFICE U.S. DIST. COURT  
AT DANVILLE, VA  
FILED

SEP 02 2005

JOHN F. CORCORAN, CLERK  
BY: *H. McDonald*  
DEPUTY CLERK

UNITED STATES OF AMERICA,

v.

KIRKWOOD D. CABINESS,

*Defendant.*

CRIMINAL CASE NO. 4:02-CR-70031

ORDER & OPINION

JUDGE NORMAN K. MOON

This matter is before the Court on Defendant's Motion for Reconsideration, filed February 4, 2005 (Document # 80). In this motion, Defendant asks the Court to reconsider its January 24, 2005 Order denying Defendant's Motion to Compel Specific Performance. Defendant is asking the Court to compel the Government to file a Rule 35 motion on his behalf. In its January 24, 2005 Order, the Court stated that it cannot compel the Government to file a Rule 35 motion unless the Government's failure to file the motion is "'based on an unconstitutional motive,' such as racial or religious animus, or is 'not rationally related to any legitimate Government end.'" *See United States v. Butler*, 272 F.3d 683, 686 (4th Cir. 2001) (quoting *Wade v. United States*, 504 U.S. 181, 185-186 (1992)).

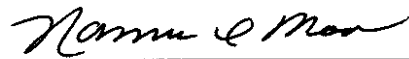
In his Motion to Reconsider, Defendant alleges that the Government denied him the Rule 35 motion based on his race and that the Government's decision was "irrational in a manner that does not advance legitimate government interest." Defendant does not present any evidence to support these allegations. Mere conclusory statements are not enough to trigger an evidentiary

hearing of Defendant's claims. Accordingly, the Court DENIES Defendant's Motion to Reconsider (Document #80). The Court also DISMISSES AS MOOT Defendant's Motion to Produce, filed February 10, 2005 (Document #81), Motion to Compel, filed April 15, 2005 (Document # 83), Motion for Hearing, filed June 27, 2005 (Document # 87), and Motion to Appoint Counsel, also filed June 27, 2005 (Document #87). The Court DISMISSES WITHOUT PREJUDICE Defendant's Motion to Compel, in order that Defendant may assert his claim as a habeas petition pursuant to 28 U.S.C. § 2255 if he so desires.

It is so ORDERED.

The Clerk of the Court is directed to send a certified copy of this Order to all counsel of record.

ENTERED:



U.S. District Judge

9/2/05

Date